

**DEPARTMENT COPY**

orig. DA

C07-155

When recorded return to:

Libby

Town Clerk  
Town of Gilbert  
50 East Civic Center Drive  
Gilbert, Arizona 85296

Re-recorded due to  
typographical error

on page 4



OFFICIAL RECORDS OF  
MARICOPA COUNTY RECORDER  
HELEN PURCELL  
2007-1184572 11/02/07 10:43 AM  
1 OF 1

Contract #2008-7101-0248

GASTELUMP

**DEVELOPMENT AND DISPOSITION AGREEMENT**

THIS DEVELOPMENT AND DISPOSITION AGREEMENT (this "Agreement") is entered into this 25<sup>th</sup> day of September, 2007, by and between HERITAGE MARKETPLACE, L.L.C, an Arizona limited liability company ("Heritage Marketplace"), and the TOWN OF GILBERT, ARIZONA, an Arizona municipal corporation ("Gilbert"). Heritage Marketplace may be collectively referred to as "Developer".

RECITALS:

- A. Gilbert has adopted a Redevelopment Plan for the redevelopment of its historic downtown, an area known as the "Heritage District." A principal goal of the Redevelopment Plan is to further economic development in the historic downtown area.
- B. The property, which is located at the northwest corner of Gilbert Road and Vaughn Avenue, and more specifically described in Exhibit A attached hereto ("Property"), is located in the Heritage District.
- C. On September 5, 2006, Gilbert issued a Request for Proposals ("RFP") for the sale and development of the Property and an Addendum on September 11, 2006. On October 20, 2006 the Developer responded to the RFP with an offer to purchase the Property on terms and conditions which contemplated the Developer's acquisition of the Property and subsequent development of the Property for a mixed-use project consistent with the Heritage Village Center (HVC) zoning designation of the Property (the "Project").
- D. Gilbert selected the Developer's response to the RFP and, as a result thereof, the parties are entering into this Agreement for the purpose of setting forth the terms and conditions with respect to which the acquisition of the Property and development of the Project by Developer will occur. This Agreement shall supersede and replace in their entirety the RFP and the response thereto submitted by the Developer.
- E. Economic development in the Heritage District will depend on the availability of parking for downtown businesses. The parking structure to be constructed pursuant to this Agreement will serve the critical roles of (i) promoting continued economic growth and development of the Heritage District, and (ii) attracting Class A office projects into the downtown to provide a strong employment base, support existing and future retail and restaurant uses and serve as a catalyst to attract desired uses into the Heritage District.
- F. A.R.S. Section 9-500.05 authorizes Gilbert to enter into a Development Agreement with a landowner or other person having an interest in real property located in Gilbert.

of Gilbert's Redevelopment's need for mixed uses in the Heritage District, inc. including restaurants, stimulation of further economic development within Gilbert, and other tangible indirect benefits to Gilbert and its citizenry. Developer acknowledges economically viable use at this location and no change in use for a period of five years. This Agreement will be permitted without amending this agreement. Any change shall follow the normal notice and hearing procedures.

H. Recital is entered into for the purposes of satisfying the above Plan. The Plan for the Heritage District and Gilbert's General

#### EMENT:

NOW, in consideration of the foregoing and for other good and valuable consideration, the parties hereby acknowledge, the parties agree as follows:

1. Property: is the sale of the property, development and use of the Project

#### Intended Development

2.1 The Developer shall develop the Property in conformance with the site plan and architectural renderings attached hereto (the "Conceptual Development Plan"). The Project shall consist of a Class A, signature building of approximately 39,000 square foot (labeled "Building A" on Exhibit B), mixed-use, retail/restaurant and office building of approximately 20,150 square foot (labeled "Building B" on Exhibit B). The space in Buildings A and B is expected to be marketed as "for lease" also includes three (3) proposed individual lots (totaling approximately 53,143 square area) that are expected to be marketed as "for-sale" build-to-suit opportunities to retail, commercial and/or residential users. The total square footage of the project is estimated to be approximately 90,000 square feet.

2.2 If development of the Property also requires a planned area development ("PAD") zoning amendment to modify any zoning of the signage requirements of the HVC zoning district, then a zoning amendment shall be filed. Such application may be processed by Developer concurrently with the application for approval. Upon receipt of Redevelopment Commission approval of the final site plan and architectural renderings, the final site plan and architectural renderings shall be attached to the existing Exhibit B. If the re-zoning application is not approved or if the Redevelopment Commission does not ultimately approve a final site plan and architectural renderings consistent with the Conceptual Development Plan, then the Parties agree to work in good faith to negotiate a revised, mutually acceptable, Conceptual Development Plan. In the event that a mutually acceptable Conceptual Development Plan cannot be agreed upon within twelve (12) months of the execution of this Agreement, this Agreement shall automatically terminate and any funds held in Escrow shall be returned to the Developer.

3. Conveyance of Property: Concurrently with the execution of this Agreement, Gilbert and the Developer shall execute the Real Estate Purchase Contract attached hereto as Exhibit C (the "Purchase Contract"), which Purchase Contract contains the specific terms and

conditions applicable to the sale of the Property by Gilbert to Developer. The parties acknowledge that the purchase price of five hundred eighty two thousand, three hundred thirty five dollars (\$582,335), based upon \$5.00 per square foot at 116,467 square feet of land set forth in the Purchase Contract is the fair value of the Property, taking into account the use restrictions which are being imposed on the Property pursuant to this Agreement and the Developer acknowledges such restrictions are reasonable and further the purposes of the Redevelopment Plan for the Heritage District. The parties hereto acknowledge that this Agreement and the Purchase Contract shall govern all of the terms and conditions relating to the conveyance of the Property by Gilbert to the Developer. In connection therewith, the parties hereby acknowledge and agree that the Developer's obligation to acquire the Property and develop the Property pursuant to the terms of this Agreement and the Purchase Contract shall be subject to and conditioned upon the satisfaction, or Developer's written waiver, of the following conditions precedent.

3.1. The Developer shall have reviewed and approved the physical condition of the Property pursuant to the provisions of Paragraph VII of the Real Estate Purchase Contract;

3.2. The Developer shall have reviewed and approved the condition of title and all survey matters affecting the Property pursuant to the provisions of Paragraph VI of the Purchase Contract;

3.3. Gilbert shall have approved the final site plan and working drawings for the improvements to be constructed by Developer, subject only to such conditions and stipulations as are acceptable to Developer pursuant to the provisions of **Section 4.3** below;

3.4. Notwithstanding anything contained in this Agreement to the contrary, if the conditions precedent described in Subparagraph 3.1 above are not satisfied or waived by Developer in writing within 180 days after the mutual execution of this Agreement, then, Gilbert shall have the right to terminate the Real Estate Purchase Contract by serving written notice to the Developer and the parties shall have no further rights, duties or obligations hereunder.

4. Gilbert Responsibilities:

4.1 Gilbert shall construct or cause to be constructed the following public improvements:

4.1.1 A public parking garage or similar structure (the "Parking Structure") shall be constructed, or cause to be constructed, by Gilbert for use by the general public, including patrons of the Property. Design on the Parking Structure will begin no later than January 31, 2008 and construction of the Parking Structure shall begin no later than June 1, 2009 in order to complete construction by December 1, 2009. The Parking Structure shall contain approximately 365 parking spaces (surface and structure) and shall be constructed on the property owned by Gilbert as depicted in Exhibit B (Conceptual Development Plan). For the first seven (7) years after completion of construction of the Parking Structure, Gilbert shall not charge a parking fee to the general public or patrons of the Property (including employees of tenants, visitors, and guests of Buildings A, B, C, D & E as designated on the Conceptual Development Plan) for use of the Parking Structure, except as provided in paragraphs 5.11 and 5.11.1 of the Development and Disposition Agreement. The exact size, location, configuration and design of the Parking Structure shall be agreed upon by the Parties prior to initiation of construction activities, and shall comply with Gilbert requirements. The agreement of one party to the size, location or configuration will not be unreasonably withheld. The Parties agree that the final location and siting of the Parking Structure will be in general accordance with the Conceptual Development Plan. If the

*Deleted 12/21/07*  
Parties fail to reach agreement on the size, location and configuration of the Parking Structure on or before January 30, 2008, Gilbert shall determine such size, location and configuration at its sole discretion, which shall include the number of parking spaces agreed to by both Parties in Section 4.1.1 of this Agreement.

*amended 12/14/09*  
4.1.2 Except in the event of Unavoidable Delay (as that term is defined in Paragraph 6.1), if construction of the Parking Structure is not completed within 30 days of the Developer receiving its Certificate of Occupancy for either Building A or B, then the Developer will send a letter stating that Gilbert has 30 days to complete the Parking Structure without penalty. If Gilbert does not complete construction of the Parking Structure within the second 30 day period, Gilbert shall pay \$23,600 to the Developer for each month that the Parking Structure is not complete for a period of up to four months and a total of \$94,400. Gilbert shall also be responsible for providing sufficient surface parking within a reasonable proximity to either Building A or B at no additional cost to the Developer. If the Parking Structure after the additional cure period of four months, the Developer may construct the Parking Structure pursuant to the requirements of the public bidding laws and in conformance to the design prepared by Gilbert. Gilbert shall reimburse Developer actual costs of construction, including an additional standard Developer/Project Management fee upon completion of the Parking Structure by Developer in accordance with the design provided by Gilbert to Developer. Prior to construction of the Parking Structure by Developer, Gilbert shall provide to Developer its requirements for public bidding and required record keeping and all relevant documents and plans relating to the Parking Structure. Gilbert shall retain all ownership and maintenance responsibilities for the Parking Structure into the future. If the Developer assumes responsibility for completing the Parking Structure and if additional outside financing is required for its completion, then Gilbert agrees to guarantee, in writing in a format as reasonably required by Developer's financial institution, all additional funds necessary for completing the Parking Structure.

4.1.3 Gilbert will allocate no more than 250 parking stalls within the Parking Structure for exclusive use of patrons of the Property (including employees of tenants, visitors, and guests of Buildings A, B, C, D & E as designated on the Concept Development Plan). It is anticipated that up to 50 of the spaces will be reserved for lease by building tenants, as referenced in paragraph 5.11 of this Agreement. Gilbert and Developer shall execute a mutually-acceptable parking license agreement providing for use of these 250 stalls in perpetuity. The specific location of said stalls shall be subject to mutual review and approval by Developer, which such approval shall not be unreasonably withheld.

4.1.4 At the end of the first seven (7) year period, at Gilbert's discretion, Gilbert may begin a charge for parking. The charge for parking shall be based upon market rates for parking in similar parking structures as determined by an independent evaluation.

4.1.5 Gilbert shall construct improvements to the Western Powerline Trail Park and coordinate with Developer to incorporate those improvements into the Project's final site plan design and layout.

4.2 Gilbert shall provide any necessary off-site improvements required for the approval of the Project, including improvement of relocated Ash Street (including adjacent sidewalks, landscaping and the like), any new or relocated street lights in any adjacent public streets, any new traffic signals, and sidewalks and landscaping along Ash next to the parking structure. Gilbert will also make improvements to the north end of the parking structure, including the area adjacent to the Western Powerline Trail Park. However, Developer will provide sidewalks and landscaping improvements along

the east side of the parking structure, along Gilbert Road and Vaughn Avenue and the portion of Ash between Vaughn Avenue and the south end of the parking structure.

4.3 Gilbert shall process the Project through its Partner Experiencing Results Together (P.E.R.T.) program. Gilbert agrees that no unusual or extraordinary plan or review requirement, conditions or stipulations will be imposed on the Developer or on any Phase of the Project.

4.4 Gilbert acknowledges that time is of the essence in the performance of its obligations of this Agreement and as such, Gilbert shall expedite all plan reviews and field inspections to the extent possible, as outlined in the P.E.R.T. schedule defined in Exhibit E, Schedule of Performance.

5. Developer's Responsibilities:

5.1 Gilbert and the Developer intend that the planning and development of the Project shall be achieved pursuant to the Schedule of Performance attached hereto as Exhibit E. From time to time following the date of this Agreement, however, the Developer and Gilbert shall, by mutual written agreement, refine and revise the Schedule of Performance as may be necessary to accommodate any unforeseen factors, events or unexpected occurrences which may necessitate such requirement or revision, such as, among other things, market considerations, adverse interest rates or other market factors adversely affecting the economic feasibility of development of the Project. All actions required to be taken by Gilbert and the Developer pursuant to the terms of this Agreement shall be taken in accordance with the Schedule of Performance in existence at the time when such performance is required.

5.2 Developer acknowledges that all improvements made by Developer to the Property shall conform to the Redevelopment Plan for the Heritage District and otherwise be in accordance with this Agreement and all applicable Gilbert codes and standards.

5.3 Developer shall construct a minimum of 50 parking spaces on the Property, as generally reflected by the Conceptual Development Plan and shall maintain the surface parking areas and all hardscape and landscape parking areas adjacent to the parking structure as depicted in Exhibit B (Conceptual Development Plan).

5.4 Developer agrees to work with Gilbert on locating a mutually beneficial location for a future bus stop along the Gilbert Road side of the property.

5.5 All construction on the Property shall be in conformance with the Heritage District Design Guidelines.

5.6 Approvals as appropriate by the Planning Commission, Redevelopment Commission (with consideration given to the recommendations made by the Design Review Board) and the Gilbert Council shall be required for development of the Project.

5.7 If, in connection with Gilbert's approval of the final site plan for the Property, Gilbert has required the relocation or undergrounding of any utilities, or the construction of off-site improvements and streetscape improvements, then the Developer shall, in conjunction with the construction of the Project, perform such activities. In addition, the Developer will be required to construct any on-site utilities located specifically within the limits of the property.

amended 12/14/09 + Jan 2011

5.8 The Parties agree that construction of the Project is expected to commence no later than July 31, 2008, subject to delays caused by the occurrence of any Unavoidable Delays (as that term is defined in Paragraph 6.1) or if Town fails to meet obligations established in Paragraph 4.3.

amended 12/14/09

5.8.1 Except in the event of Unavoidable Delay (as that term is defined in Paragraph 6.1) if Developer has commenced construction on the Property by July 31, 2008, or such later date as the parties agree in writing, but thereafter fails to substantially complete construction of either Building A or Building B by December 31, 2009, or such later date as the parties agree in writing, subject to the occurrence of any Unavoidable Delays or delays caused by Gilbert, then Gilbert shall have the right to provide a written notice of default to Developer stating that the Developer has sixty (60) days to complete either Building A or B without penalty. If the Developer does not complete either Building A or B within the 60 day period the Developer shall pay \$23,600 to Gilbert for each month that either Building A or B is not complete for a period up to four months and an amount not to exceed \$94,400. If Developer fails to thereafter substantially complete construction of either Building A or Building B within the six month period stated above, Developer shall immediately re-convey the Property to Gilbert, free and clear of all liens and encumbrances created by Developer after close of escrow on the property. Developer shall pay to Gilbert the costs incurred by Gilbert for the design and construction of the Parking Structure in an amount not to exceed \$2,000,000, less the purchase price paid by Developer for the Property, but not any improvements on the property. All dates assume execution of the Development Agreement by September 25, 2007 and are subject to day to day extension based upon ultimate date of execution of the Development Agreement.

5.9 Developer acknowledges that the Property currently consists of more than one platted lot and that the Developer shall be responsible for the costs of replatting said lots. Gilbert shall reasonably cooperate in the replatting effort, to the extent requested by Developer.

5.10 Developer agrees to construct sidewalks along Vaughn Avenue and Gilbert Road that generally replicate the design and materials used in the streetscape surrounding the Oregano's Pizza Bistro located south of the Project.

5.11 In consideration for the parking rights provided the Project by the Parking License Agreement, Developer shall cooperate with Gilbert in the leasing of a certain portion of covered and "reserved for individual" parking stalls to employees of tenants of the Project. Revenue from this parking will either be paid directly to Gilbert or will pass through the Heritage Marketplace ownership. It is anticipated that between 10%-15% (approximately 50 spaces) of the total number of stalls allocated for use by patrons of the Project will be leased from Gilbert as covered and "reserved for individual." Developer agrees to allocate additional "reserved for individual" parking stalls if the demand increases in the future. The leased spaces will be reserved between 8:00 AM and 6:00 PM, Monday-Friday. The rental rate to be charged shall be comparable to other parking structures of Class A buildings in the Phoenix metropolitan area as determined by an independent evaluation. The revenue based on Project tenants paying a premium for reserved covered stalls within the Parking Structure is estimated to be approximately:

Years 1 through 5	\$24,000/year (50 stalls at \$40 per stall, per month)
Years 6 through 10	\$27,000/year (50 stalls at \$45 per stall, per month)
Years 11 through 15	\$30,000/year (50 stall at \$50 per stall, per month)



The total payment over fifteen years is estimated to be \$405,000. These payments will be made on a quarterly basis. It should be noted that the total number of reserved stalls is an estimate and could be higher or lower based on demand. Heritage Marketplace agrees to pass all revenue on to Gilbert, but in no way guarantees the payments listed above because the actual demand is unknown at this time.

5.11.1 The balance of the parking stalls provided for use by tenants of the Project (approximately 200), as described in paragraph 4.1.3 of this Agreement, will be a combination of covered and non-covered stalls. These stalls will be located in signed, permit/decal-required areas for exclusive use by the Project and will not be open parking available to the general public between the hours of 8:00 AM and 3:00 PM, Monday-Friday.

5.11.2 In consideration for the parking rights provided the Project by the Parking License Agreement, Developer shall make a payment to Gilbert in the amount of \$349,401.00. This payment shall be made in two parts as follows:

\$50,000 paid within 30 days of commencement of construction of the Parking Structure.

\$299,401 paid within 30 days of completion of the Parking Structure.

5.11.3 In consideration for the parking rights provided the Project by the Parking License Agreement, Developer shall also make payments to Gilbert in the amount of \$243,375, paid over fifteen annual payments as follows:

Years 1 through 5      \$14,750/year

Years 6 through 10      \$16,225/year

Years 11 through 15      \$17,700/year

Annual payments will be made on or about January 1 each year commencing with the first January following the Parking Structure completion date.

5.11.4 In consideration for the parking rights provided the Project by the Parking License Agreement, Developer shall also make an annual contribution to the maintenance and operation of the Parking Structure in the amounts that follow:

Years 1 through 5      \$3,500/year

Years 6 through 10      \$4,375/year

Years 11 through 15      \$5,250/year

The total payment over 15 years will be \$65,625. These annual payments will be made on or about January 1 commencing with the first January following the Parking Structure completion date.

5.12 Developer shall include in the Project a minimum of two (2) restaurants of at least 2,000 SF (two thousand square feet) in size. Parties agree that the definition of restaurant for the purpose of this Agreement shall include dining facilities that are both order at the table and order at the

counter services. If Developer fails to comply with this paragraph, Gilbert may terminate this agreement.

6. General Provisions:

6.1. Whether stated or not, all periods of time in this Agreement are subject to this paragraph. Neither Gilbert nor Developer shall be considered in default of this Agreement in the event of Unavoidable Delays. In the event of the occurrence of an Unavoidable Delay, the time or times of performance shall be extended for the period of the Unavoidable Delay, providing that the Party seeking the benefit of the Unavoidable Delay shall, within thirty (30) days after such Party knows of any such Unavoidable Delay, notify the other Party in writing of the event giving rise to the Unavoidable Delay. "Unavoidable Delays" shall mean the following acts or events, to the extent that they substantially impair the ability of a Party to carry out its obligations under this Agreement: acts of God, acts of the Federal, state or local government (other than ordinary course of business activities or decisions of the Town), acts of war or terrorism, litigation concerning the validity and enforceability of this Agreement or relating to transactions contemplated by this Agreement (other than the effect of litigation instituted by Developer, or a successor in interest or tenant of Developer, against the Town), fires, floods, epidemics, quarantine, strikes, embargoes, and unusually severe and unanticipated weather or the delays of subcontractors or materialmen due to such causes. In no event shall: (i) any Party's financial condition or inability to fund or obtain funding, financing or leasing constitute an Unavoidable Delay with respect any obligation of such Party; or (ii) any delay arising from a Party's default or other failure to perform under this Agreement constitute an Unavoidable Delay with respect to such Party's obligations under this Agreement.

6.2 Notices: All notices, filings, consents, approvals under the communications provided for herein or given in connection herewith shall be validly given, filed, made, delivered or served if in writing and delivered personally or sent by registered or certified U.S. Postal Service mail, return receipt requested, postage prepaid, to:

To Gilbert:

Town Manager  
Town of Gilbert  
50 East Civic Center Drive  
Gilbert, Arizona 85296

To Developer:

Mike Nelson, Managing Member  
Heritage Marketplace, L.L.C  
1045 76<sup>th</sup> Street, Suite 2000  
West Des Moines, IA 50266

Tim Becker  
Heritage Marketplace, L.L. C.  
101 North First Avenue, Suite 2000  
Phoenix, AZ 85003

Rhett Bordner & Brian Martin  
Heritage Marketplace, L.L.C.  
1010 East Vista del Cerro, Suite A  
Tempe, Arizona 85281

or such other addresses as either party may from time to time designate in writing and deliver in a like manner. Any such change of address notice shall be given at least ten days before the date on which the change is to become effective.



6.3 Mailing Effective: Notices given by mail shall be deemed delivered 72 hours following deposit in the U.S. Postal Service in the manner set forth above.

6.4 Waiver: No delay in exercising any right or remedy shall constitute a waiver thereof and no waiver by the parties of the breach of any provision of this Agreement shall be construed as a waiver of any preceding or succeeding breach of the same of any other provision of this Agreement. Nothing herein or in the stipulation shall constitute or be deemed to be a waiver by Developer of its rights to request future rezoning or changes in development standards for all or any portion of the Property pursuant to Gilbert procedures and requirements existing at the time of the request.

6.5 Attorneys Fees and Costs: If legal action by either party is required because of a breach of this Agreement or to enforce a provision of this Agreement, the prevailing party is entitled to reasonable attorneys and court costs.

6.6 Counterparts: This Agreement may be executed in two or more counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same instrument.

6.7 Headings: The description headings of the paragraphs of this Agreement are inserted for convenience only and shall not control or affect the meaning or construction of any of the provisions of this Agreement.

6.7 Entire Agreement: This Agreement, together with the Purchase Contract and all exhibits, constitutes the entire Agreement between the parties and shall not be changed or added to except as agreed to by the parties in writing. All prior and contemporaneous agreements, representations and understandings of the parties, oral or writing, are superseded by this Agreement.

6.9 Amendment or Cancellation of the Agreement: Except as otherwise provided herein, this Agreement may be amended or canceled in whole or in part and with respect to all or any portion of the Property only with the mutual consent of Gilbert and Developer of that portion of the Property to which the amendment or cancellation will be applicable. Within ten days after any such amendment or cancellation of this Agreement, the amendment or cancellation shall be recorded by Gilbert in the official records of Maricopa County.

6.10 Severability: If any provision of this Agreement is declared void or unenforceable, the provisions will be severed from this Agreement, which shall otherwise remain in full force and effect, provided that the overall intent of the parties is not materially vitiated by the severability.

6.11 Governing Law: This Agreement is entered into in Arizona and shall be construed and interpreted under the laws of the State of Arizona.

6.12 Recordation: No later than ten days after this Agreement has been executed by Gilbert and Developer it shall be recorded in its entirety by Gilbert in the official records of Maricopa County, Arizona.

6.13 Default, Remedies: If any party to this Agreement breaches any provision of this Agreement the non-defaulting party shall be entitled to all remedies set forth in this Agreement or as may be available at both law and in equity including specific performance.

6.14 Authority: The parties to this Agreement represent to each other that they have full power and authority to enter into this Agreement.

6.15 Binding Effect: This Agreement shall be assignable to Developer's lender(s), buyer(s), affiliated limited liability companies, and/or other relevant parties, subject to notice to Gilbert, as is customarily required for the financing and/or sale of the similar real property. This Agreement is binding on successors, assigns and transferees of any interest in the Property and shall be incorporated by reference in any instrument purporting to convey any instrument to the Property.

6.16 Third Parties: There are no third party beneficiaries to this Agreement.

6.17 Marketing Signage/Trailer: Developer shall be permitted to install marketing trailer/signage, subject to Gilbert sign ordinance, to market the Project and the Developer upon execution of this Agreement.

*added 6-18-12/MLD*  
IN WITNESS WHEREOF, the parties have executed this Agreement as of the day first above written.

TOWN OF GILBERT, an Arizona municipal corporation

By   
Steven M. Berman, Mayor

STATE OF ARIZONA       )  
  ) ss.  
COUNTY OF MARICOPA   )


On this 25<sup>th</sup> day of September, 2007, before me, the undersigned officer, personally appeared Steven M. Berman, who acknowledged himself to be the Mayor of the TOWN OF GILBERT, an Arizona municipal corporation:

☒ whom I know personally;  
☐ whose identity was proven to me on the oath of \_\_\_\_\_, a credible witness by  
me duly sworn;  
☐ whose identity I verified on the basis of his \_\_\_\_\_,

and he, in such capacity, being authorized so to do, executed the foregoing instrument for the purposes therein contained on behalf of that entity.

IN WITNESS WHEREOF, I hereunto set my hand and official seal.



  
Notary Public

HERITAGE MARKETPLACE, L.L.C.  
an Arizona Limited Liability Company

By 

Michael K. Nelson

Its Managing Member

Towne  
STATE OF ARIZONA )  
Polk ) ss.  
COUNTY OF MARICOPA )

On this 5<sup>th</sup> day of October, 2007, before me, the undersigned officer,  
personally appeared Michael K. Nelson, who  
acknowledged him/herself to be Managing Member of HERITAGE  
MARKETPLACE, L.L.C., an Arizona limited liability company:

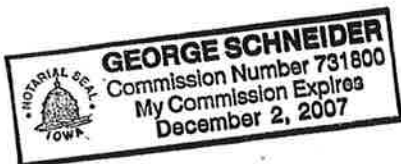
☒ whom I know personally;  
☐ whose identity was proven to me on the oath of \_\_\_\_\_, a credible witness by  
me duly sworn;  
☐ whose identity I verified on the basis of his/her \_\_\_\_\_,

and s/he, in such capacity, being authorized so to do, executed the foregoing instrument for the purposes  
therein contained on behalf of that entity.

IN WITNESS WHEREOF, I hereunto set my hand and official seal.

NOTARY SEAL:

  
Notary Public



**EXHIBIT A**

Amended 12/14/09

**LEGAL DESCRIPTION OF THE PROPERTY**

Beginning at the southeast corner of Tract B, Ayers Subdivision;

Thence south  $89^{\circ}09'35''$  west, 540 feet plus or minus, to the southwest corner of Lot 2 of Creeds Addition;

Thence north  $00^{\circ}49'41''$  west along the west line of said Lot 2 north  $00^{\circ}50'44''$  west a distance of 161 feet plus or minus;

Thence north  $89^{\circ}09'35''$  east a distance of 351 feet plus or minus;

Thence north  $00^{\circ}50'44''$  west a distance of 146 feet plus or minus;

Thence south  $89^{\circ}30'57''$  east 189 feet plus or minus more or less to the west right of way of Gilbert Road;

Thence along said right of way south  $00^{\circ}50'44''$  east 307 feet plus or minus less to the point of beginning;

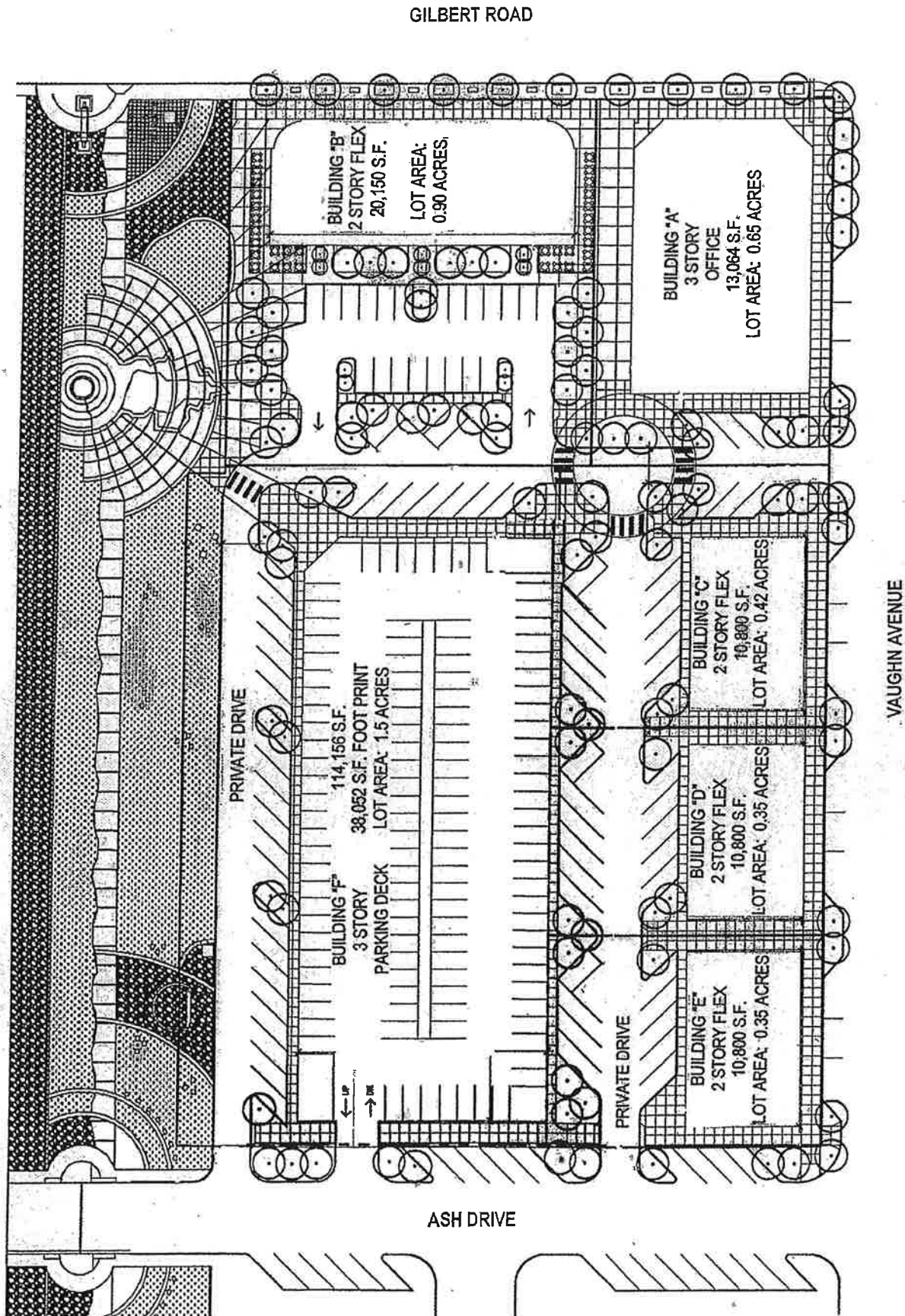
Containing 116,467 square feet or 2.67 acres more or less.

**EXHIBIT B**

**CONCEPTUAL DEVELOPMENT PLAN**

EXHIBIT B *revised 12-14-09*

# CONCEPTUAL DEVELOPMENT PLAN





## EXHIBIT C

### HERITAGE MARKETPLACE REAL ESTATE PURCHASE CONTRACT

The parties to this Real Estate Purchase Contract (the "Contract") are HERITAGE MARKETPLACE, L.L.C., an Arizona limited liability company, (hereinafter "Buyer"), and the TOWN OF GILBERT, ARIZONA, a municipal corporation organized under the laws of the State of Arizona (hereinafter "Seller"). The Buyer and Seller are entering into this Contract pursuant to the terms and conditions of that Development and Disposition Agreement of even date herewith between the parties (the "Development Agreement"). Pursuant to the terms and conditions of the Development Agreement, the Seller agrees to sell and the Buyer agrees to purchase certain real property under the terms and conditions set forth below:

#### I. LEGAL DESCRIPTION

The Property to be conveyed by the Seller to the Buyer under this Contract is legally described in Exhibit 1, attached hereto and made a part hereof.

#### II. PURCHASE PRICE

The total purchase price for the Property is \$5.00 per square foot based upon approximately 116,467 square feet of land, for a total purchase price of five hundred eighty two thousand, three hundred and thirty five dollars (\$582,335), to be paid by the Buyer to the Seller for the Purchase of the Property, through Fidelity National Title, 2390 E. Camelback Road, Suite 340, Phoenix, Arizona 85016, serving as Escrow Agent, upon close of escrow. The Final Purchase Price is subject to adjustment based upon the actual net square feet of land area per ALTA survey of the Property.

#### III. BROKERAGE COMMISSION

The Seller has represented itself, and has not been represented by a real estate broker, agent or agency to market and sell the Property. Seller is solely responsible for compensating costs contained within any agreements, and hereby indemnifies the Buyer against any claim for commission (including all costs and attorneys' fees expended in defending against such claim) arising from or related to the transaction set forth in this Contract. This indemnity shall survive termination of this Contract.

#### IV. RISK OF LOSS

A. Except as otherwise provided in this Contract, all risk of loss related to ownership and possession of the Property, including liability to third persons, shall be the responsibility of the Seller until the title and possession of the Property passes to the Buyer at Close of Escrow. Seller shall indemnify and hold Buyer harmless for all such loss, damage, liability, fees or costs of any kind whatsoever, except those caused by the Buyer. This indemnity shall survive termination of this Contract.

B. Seller and Buyer shall include Property in its liability insurance coverage.

## V. CLOSING COSTS AND PRORATIONS

- A. Seller will pay all escrow fees related to the sale of the Property, including a standard Owner's Policy naming Buyer as the insured. The Seller shall be responsible for all property taxes and assessments levied and due against the Property prior to closing. The Buyer shall be responsible for all taxes and assessments levied against the Property after the closing date.
- B. All of the above-referenced costs that are the responsibility of the Seller shall be paid into escrow on or before the Close of Escrow in addition to the purchase price. All costs that are the responsibility of the Buyer as referenced above shall be paid from the proceeds of the sale price to which the Seller is entitled.

## VI. TITLE WARRANTY

Fee simple absolute title to the Property shall be transferred by the Seller to the Buyer as stated in Section III above by General Warranty Deed, which shall include conveyance of all surface and ground water rights related to the Property. Buyer is only obligated to accept title to the Property at Close of Escrow if: (1) the Property is free and clear of all defects, exceptions, easements, covenants, conditions, restrictions, mining claims, liens and encumbrances; and (2) the Buyer, at its sole discretion, is otherwise satisfied with the condition of title as reflected in the Title Report which shall be subject to the review and approval of the Buyer. In connection therewith, prior to or concurrently with the execution of this Agreement, the Escrow Agent shall prepare a preliminary title report prepared by a title insurer (the "Title Company") acceptable to the Buyer (the "Title Report") which sets forth all liens, encumbrances or other exceptions to title applicable to the Property, together with legible copies of all recorded liens, encumbrances and title exceptions as may be disclosed therein. In addition, within thirty (30) days after the execution of this Agreement, the Seller shall cause to be prepared and delivered to Buyer a current ALTA survey of the Property, which survey shall identify and calculate the square footage of all right-of-way dedications and easements (the "Survey"). Fee simple title to the Property shall be conveyed to Buyer free of any liens, encumbrances or other exceptions to title, except those items approved by Buyer Developer in the Title Report (the "Permitted Title Exceptions"). If, after reviewing the Title Report and the Survey, the Buyer objects to any title exceptions set forth in the Title Report or shown on the Survey, the Seller shall use commercially reasonable efforts to cause any such objected items to be removed as a title exception or to cause the Title Company to insure over such matters at its sole cost and expense. If the Seller fails to cause such matter to be removed as an exception or insure over such matter, then the Buyer shall have the right to cause the same to occur and offset the costs incurred against the Purchase Price to be paid by Buyer to the Seller at Closing.

## VII. INVESTIGATIONS

Buyer shall have until the Close of Escrow to make such investigations of the Property as Buyer deems necessary to assure Buyer that the Property is suitable for Buyer's intended purposes and that no hazardous wastes or substances are located on or under the Property. Upon the mutual execution of this Agreement, the Seller shall deliver to the Buyer all reports, studies, investigations, materials, analyses, tests and evaluations (including, without limitation, environmental assessments) which the Seller may have in its possession or its control and in any way related to the Property. In addition to the materials provided by the Seller, the Buyer shall

have the right from time to time to enter upon the Property for the purpose of conducting any separate investigation, test, survey, analysis or evaluation with respect to the condition of the Property. All costs and expenses of any additional tests, studies, surveys or analyses desired by the Buyer shall be paid for by the Buyer. In the event that any such analysis, test, study or evaluation of the Property discloses that environmental remediation is necessary or required for any portion of the Property, then, in that event, Buyer shall have the right to elect to either (a) not acquire title to the affected portion of the Property and to acquire and develop the balance of the Property, in which event the parties shall work together in good faith to make appropriate modifications to the Conceptual Development Plan in order to permit development of the Property exclusive of the affected portion of the Property, or (b) consummate the acquisition of the Property and offset against the Purchase Price to be paid by Buyer to the Seller the estimated costs and expenses to be incurred by Buyer in connection with the remediation of such conditions, provided however that the Town shall first have approved the costs of remediation.

#### VIII. SELLER'S REPRESENTATIONS, WARRANTIES, AND COVENANTS

Seller warrants, represents, and covenants (with the understanding that Buyer is relying on these warranties, representations, and covenants) that:

- A. Except as reflected in the preliminary title report at the time of execution of the Contract, there are no claims, actions, suits, or other proceedings pending or threatened by any governmental department or agency or any other corporation, partnership, entity, or person whomsoever, nor any voluntary actions or proceedings contemplated by Seller, which in any manner or to any extent may detrimentally affect Buyer's right, title, or interest in and to the Property or the value of the Property or Seller's ability to perform Seller's obligations under this Contract.
- B. Seller owns the Property in fee simple absolute, subject only to the matters reflected in the preliminary title report.
- C. There is no pending or threatened condemnation or similar proceeding affecting any part of the Property, and Seller has not received any notice of any such proceeding and has no knowledge that any such proceeding is contemplated.
- D. No work has been performed or is in progress at the Property and no materials have been furnished to the Property that might give rise to mechanic's, materialman's, or other liens against any part of the Property.
- E. Seller is not prohibited from consummating the transactions contemplated by this Contract or any law, regulation, agreement, instrument, restriction, order or judgment.
- F. There are no parties in adverse possession of the Property; there are no parties in possession of the Property except Seller; and no party has been granted any license, lease, or other right relating to the use of possession of the Property.
- G. There are no attachments, executions, assignments for the benefit of creditors, receiverships, conservatorships, or voluntary or involuntary proceedings in bankruptcy or pursuant to any other laws for relief of debtors contemplated or filed by Seller or pending against Seller or affecting or involving the Property.

- H. There is no default, nor has any event occurred which with the passage of time or the giving of notice or both would constitute a default in any contract, mortgage, deed of trust, lease, or other instrument which relates to the Property or which affects the Property in any manner whatsoever.
- I. There are no contracts or other obligations outstanding for the sale, exchange, or transfer of all or any part of the Property.
- J. There are no violations of laws, rules, regulations, ordinances, codes, covenants, conditions, restrictions, instructions, or agreements applicable to the Property. Seller has not received notices from any insurance companies, governmental agencies, or any other person with respect to violations concerning the Property. If any notices of violations are received prior to Close of Escrow, Seller shall immediately submit copies to Buyer and Buyer's review and acceptance shall be a condition precedent to Close of Escrow.
- K. Seller will not at any time prior to Close of Escrow grant to any person an interest in the Property.

IX. CLOSE OF ESCROW

- A. Escrow shall be opened within 30 days of execution of the Development Agreement by the Town of Gilbert, by Buyer depositing \$25,000 into an escrow account. This Escrow Deposit will be considered non-refundable and shall apply to the Purchase Price, except in the event that Gilbert does not ultimately approve the Project subject to the Project being in general accordance with the Conceptual Development Plan and subject to any mutually-agreeable changes to the Conceptual Development Plan by the Parties.
- Amended 12/14/04*  
B. The balance of the Purchase Price shall be paid and the Close of Escrow shall occur within 90 days of the final approval of the Project by the Redevelopment Commission, or at anytime earlier at Buyer's discretion, subject to satisfaction of all conditions precedent to Closing as described in Section 3 of the Development Agreement for the Property and subject to the provisions of Section VI of this purchase contract. Close of Escrow will be at the offices of Fidelity National Title Insurance Company, in Phoenix, Arizona.
- C. Any encumbrances existing against the Property at the Close of Escrow shall be satisfied from the proceeds of the sale price.

X. EMINENT DOMAIN/CONDEMNATION

Should, for any reason, all or any portion of the Property be purchased prior to Close of Escrow by any government entity (other than Seller) by eminent domain or condemnation, any proceeds from such transaction shall belong solely to the Seller. Upon condemnation of all or any portion of the Property, Seller shall be responsible to pay all escrow costs and fees related to this Contract and all rights and obligations of the parties under this Contract shall terminate.

XI. USE OF SUBJECT PROPERTY

Seller shall have the exclusive right to use the Property until Close of Escrow. Seller agrees to maintain the Property through Close of Escrow in the same condition the Property exists at the execution of this Contract. Seller shall not remove any fixtures or improvements from the Property unless otherwise agreed to by the Buyer in writing. The Buyer does not have any right to use or enter upon the Property until completion of the Close of Escrow and transfer of title, unless otherwise agreed to by the Seller.

XII. RIGHT TO ENCUMBER

As referenced above, the Property is to be free and clear of all liens and encumbrances at the time of transfer of title from the Seller to the Buyer. The Seller shall not voluntarily encumber the Property after execution of this Contract. Seller agrees that all encumbrances existing against the Property at Close of Escrow shall be satisfied from the proceeds of the sale.

XIII. ASSIGNABILITY

Neither the Seller nor the Buyer may assign any of its rights or obligations under this Contract without the other party's advance written consent, which shall not be unreasonably withheld. This Contract shall be binding upon Seller and Buyer and their respective successors and assigns.

XIV. DEFAULT

- A. Default by Seller: All provisions of this Contract are hereby deemed to be material. The Buyer shall have all rights and remedies available to it under Arizona law should the Seller breach any of the provisions under this Contract. Buyer shall immediately be entitled to the return of all amounts it paid pursuant to the Contract and to terminate the Contract, to damages and to specific performance by Seller, should the Seller breach any provision of this Contract.
- B. Default by Buyer: All provisions of this Contract are hereby deemed to be material. The parties agree that Seller's sole remedy for Buyer's breach of this Contract shall be to retain any deposits held in Escrow.
- C. Escrow Costs and Fees. The breaching party shall be responsible to pay all escrow costs and fees related to this Contract.
- D. Attorneys' Fees and Court Costs. The prevailing party shall be entitled to an award of all costs and attorneys' fees incurred should legal action be necessary by either party to enforce the terms of this Contract.

XV. SUPERSEDING AGREEMENT

This Contract, together with the Development Agreement, constitutes the entire contract of the parties relating to the Property and the parties agree that the terms of this Contract and the Development Agreement shall supersede all previous oral and written contracts between them.

XVI. MODIFICATION

The terms of this Contract may only be modified upon written approval of all parties to this Contract.

XVII. SEVERABILITY

In the event any provision of this Contract shall be held invalid or unenforceable by any court of competent jurisdiction, such holding shall not invalidate or render unenforceable any other provision thereof.

XVIII. ARIZONA LAW

Seller and Buyer both acknowledge that this Contract is executed in Maricopa County, Arizona, and relates to property located in Maricopa County, Arizona. Should legal action be necessary to enforce the terms of this Contract, all parties agree that the laws of the State of Arizona shall apply. All parties agree that the proper venue for any lawsuit shall be Maricopa County, Arizona.

XIX. AMBIGUITY

This Contract was drafted by the Seller with the assistance of their attorneys. Neither the Seller nor its attorneys at the law firm of Curtis, Goodwin, Sullivan, Udall & Schwab, P.L.C. have rendered legal or other advice to Buyer regarding sale of the subject property or the specific terms of this Purchase Contract. Buyer is aware of its right to obtain independent professional and/or legal assistance with this Contract and, upon signing of the Contract, represents that they have taken all steps they deem necessary (including but not limited to, seeking the advice of professionals and/or attorneys) to assist them with this transaction. Consequently, the ambiguity in this Contract shall not be construed against either party.

XX. CONFLICT OF INTEREST

The Buyer recognizes that the Seller is a political subdivision of the State of Arizona. Pursuant to A.R.S. § 38-511, the Seller may cancel this Agreement within three (3) years after its execution without penalty or further obligation if any person significantly involved in initiating, negotiating, securing, drafting or creating this Contract on behalf of the Seller is, at any time while the Contract or any extension thereof is in effect, an employee or agent of the Buyer in any capacity or a consultant to the Seller with respect to the subject matter of this Contract. Notice of any such cancellation shall be given by the Buyer to the Seller with respect to the subject matter of this Contract. Notice of any such cancellation shall be given by the Seller to the Buyer pursuant to the terms of A.R.S. § 38-511. Should cancellation occur under this provision, the Seller shall return to the Buyer all moneys paid by the Buyer under this Contract, together with all costs and expenses incurred by Buyer in connection with the purchase and development of the Property, Seller shall be responsible for payment of all escrow fees, and Buyer shall convey the Property back to the Seller.



XXI. AUTHORITY TO EXECUTE

The Seller and Buyer both acknowledge that the persons whose signatures appear below have appropriate authority to execute this Contract on behalf of the Seller and Buyer. This Contract may be executed in several counterparts which together shall constitute an original.

XXII. NOTICES

Notices required or permitted by this Contract shall be given in writing and personally delivered or sent by first class mail, postage prepaid to:

Buyer:

Mike Nelson, Managing Member  
Heritage Marketplace, L.L.C.  
1045 76<sup>th</sup> Street, Suite 2000  
West Des Moines, IA 50266

With a copy to:

Tim Becker  
Heritage Marketplace, L.L.C.  
101 North First Avenue, Suite 2000  
Phoenix, AZ 85003

and

Rhett Bordner & Brian Martin  
Heritage Marketplace, L.L.C.  
1010 East Vista del Cerro Drive, Suite A  
Tempe, Arizona 85281

Seller:

Town Manager  
Town of Gilbert  
50 East Civic Center Drive  
Gilbert, Arizona 85296

With a copy to:

Susan D. Goodwin  
Seller Attorney  
Curtis, Goodwin, Sullivan,  
Udall & Schwab, P.L.C.  
2712 North Seventh Street  
Phoenix, Arizona 85006-1090

SIGNATURE PAGE FOLLOWS

ACCEPTED BY:

DATE: \_\_\_\_\_, 2007

BUYER:

HERITAGE MARKETPLACE, L.L.C.,  
an Arizona limited liability company

\_\_\_\_\_  
By Michael K. Nelson  
Its Managing Member

SELLER:

TOWN OF GILBERT, ARIZONA,  
a municipal corporation

By \_\_\_\_\_  
Steven M. Berman, Mayor

ATTEST:

\_\_\_\_\_  
Catherine A. Templeton, Town Clerk

APPROVED AS TO FORM:

By \_\_\_\_\_  
Curtis, Goodwin, Sullivan,  
Udall & Schwab, P.L.C.  
Seller Attorneys

## **EXHIBIT 1 TO PURCHASE CONTRACT**

### **PROPERTY DESCRIPTION FOR HERITAGE MARKETPLACE, L.L.C.**

Subject property is 116,467 square feet or 2.67 acres more or less and is located at the northwest corner of Gilbert Road in Vaughn Avenue in Gilbert, Arizona. The legal description is as follows:

Beginning at the southeast corner of Tract B, Ayers Subdivision;

Thence south  $89^{\circ}09'35''$  west, 540 feet plus or minus, to the southwest corner of Lot 2 of Creeds Addition;

Thence north  $00^{\circ}49'41''$  west along the west line of said Lot 2 north  $00^{\circ}50'44''$  west a distance of 161 feet plus or minus;

Thence north  $89^{\circ}09'35''$  east a distance of 351 feet plus or minus;

Thence north  $00^{\circ}50'44''$  west a distance of 146 feet plus or minus;

Thence south  $89^{\circ}30'57''$  east 189 feet plus or minus more or less to the west right of way of Gilbert Road;

Thence along said right of way south  $00^{\circ}50'44''$  east 307 feet plus or minus less to the point of beginning;

Containing 116,467 square feet or 2.67 acres more or less.

Amended 12-14-09 & 1-27-11

## EXHIBIT E

### SCHEDULE OF PERFORMANCE

The following schedule is preliminary in nature and represents approximate submittal dates and plan turn-around times. Since the Project will be part of the P.E.R.T. program, a final schedule will be reached by mutual consent of the Gilbert Development Services Department and representatives of Heritage Marketplace, L.L.C. prior to submittal of plans.

#### Site Plan/Architecture

Applicant to submit required documentation on or about December 1, 2007 for Design Review Board.

Design Review Board Hearing to be heard no later than its February 2008 meeting.

Design Review Board will make a recommendation to the Redevelopment Commission.

Redevelopment Commission will hear case at its March 2008 meeting.

#### Permits

Typical turn-around time for construction drawing permits is 20 working days for first review and 10 working days for second review. A more exact schedule will be worked out through the P.E.R.T. process.

#### Commencement/Completion of Construction

HERITAGE MARKETPLACE, L.L.C. will commence construction for development of the Property no later than July 31, 2008 and complete construction no later than December 31, 2009. Commencement of construction will be defined by the start of the concrete foundations for either Building A or Building B. Completion of construction will be defined as the date a certificate of completion (or equivalent) as issued by Gilbert for either Building A or Building B.